RECORD AND BRIEFS

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No. 15-1031

IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Writ of Certiorari to the Arizona Supreme Court

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the Uniformed Services Former Spouses' Protection Act preempts a state court's order directing a veteran to indemnify a former spouse for a reduction in the former spouse's portion of the veteran's military retirement pay, where that reduction results from the veteran's post-divorce waiver of retirement pay in order to receive compensation for a service-connected disability.

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OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) is reported at 361 P.3d 936. The decision of the Arizona Court of Appeals (Pet. App. 15a) is unreported but is available at 2014 WL 7236856. The decision of the Arizona Superior Court (Pet. App. 23a) is unreported.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on December 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

The relevant provisions of the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982), are codified at 10 U.S.C. § 1408. 10 U.S.C. § 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(a)(4) provides, in pertinent part:

> The term "disposable retired pay" means the total monthly retired pay to which a member is entitled ... less amounts which–
>
> ...

> (B) are deducted from the retired pay of such member ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38;[1]
>
> ...

38 U.S.C. § 5304(a)(1) provides, in pertinent part:

> Except ... to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay ... shall be made concurrently to any person based on such person's own service ... .

38 U.S.C. § 5305 provides, in pertinent part:

> ... [A]ny person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, ... and who would be eligible to receive pension

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[1] On December 23, 2016, the President signed legislation amending the USFSPA to specify that for purposes of calculating "disposable retired pay," the "total monthly retired pay to which a member is entitled" shall be calculated based on the member's pay grade and years of service at the time of the member's divorce, as opposed to the member's retirement. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 641; *infra* at 41-42. The amendments do not change the relevant text of the provisions at issue in this case; they do, however, affect the numbering of one provision. Specifically, 10 U.S.C. § 1408(a)(4)(B) will now be 10 U.S.C. § 1408(a)(4)(A)(ii). Because the U.S. Code has not yet been updated to reflect this change, Petitioner uses the former numbering scheme in this brief.

> or compensation under the laws administered by the Secretary [of Veterans Affairs] if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation.

STATEMENT

A. Statutory Framework

The federal government provides a pension for members of the Armed Forces who retire after serving for a minimum period (generally twenty years). *Mansell v. Mansell*, 490 U.S. 581, 583 (1989); *see, e.g.*, 10 U.S.C. § 8911(a) (Air Force). This pension is known as Military Retirement Pay ("MRP"). The size of a veteran's pension is determined based on the veteran's length of service and rank at the time of retirement. *See, e.g.*, 10 U.S.C. § 8991 (Air Force).

Separately, veterans who suffer from service-connected disabilities are entitled to receive compensation under title 38 of the U.S. Code. *See* 38 U.S.C. §§ 1110, 1131. The amount of disability pay[2] a veteran may receive for a given disability is based on a scale that reflects "the average impairments of earning capacity resulting from such injuries in civil

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[2] Throughout this brief, the phrase "disability pay" refers to disability compensation received under title 38.

occupations." *Id.* § 1155.

In order to receive disability pay, veterans who are entitled to MRP generally must waive an equivalent portion of their MRP. *See* 38 U.S.C. §§ 5304(a)(1), 5305.[3] Veterans in that position often elect to receive disability pay because, unlike MRP, disability pay is exempt from federal, state, and local taxation. *See* 38 U.S.C. § 5301; *Mansell*, 490 U.S. at 583-84.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that federal law did not permit states to treat MRP as divisible property in divorce proceedings. There, a husband and wife had divorced while the husband was still an active-duty member of the Armed Forces. *Id.* at 216. California, where the couple was divorced, was (and still is) a "community property" state, meaning that it "treats all property earned by either spouse during the marriage as community property; each spouse is deemed to make an equal contribution to the marital enterprise, and therefore each is entitled to share equally in its assets." *Id.* Thus, in accordance with community property principles, the divorce decree ordered the husband, upon retirement, to pay his ex-wife a portion of his

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[3] In 2003, Congress provided for concurrent receipt of MRP and disability pay for veterans with service-connected disability ratings of 50 percent or greater. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 641-642, 117 Stat. 1392, 1511-17 (2003) (codified at 10 U.S.C. §§ 1413a, 1414). Because Petitioner is only 20 percent disabled, Pet. App. 3a, that provision does not apply in this case.

MRP based on the number of years the couple was married during his military service. *Id.* at 218 (quotation marks omitted).

On appeal, this Court held that the division of MRP in the divorce decree was preempted by federal law. It explained that Congress conferred MRP as a "personal entitlement" of service members and that "Congress intended that military retired pay actually reach the beneficiary." *Id.* at 226, 228 (quotation marks omitted). Further, the Court found that states' treatment of MRP as community property had "the potential to frustrate" Congress' two objectives in enacting the military retirement pay system—"to provide for the retired service member" and "to meet the personnel management needs of the active military forces." *Id.* at 232-33. With respect to the first objective, the Court observed that the wife's asserted community property interest "promise[d] to diminish that portion of the benefit Congress ha[d] said should go to the retired service member alone" and that state courts were "not free to reduce the amounts that Congress ha[d] determined [we]re necessary for the retired member." *Id.* at 233 (quotation marks and brackets omitted). With respect to the second, the Court noted that division of MRP in divorce would "diminish[]" the "inducement for enlistment or re-enlistment" Congress had provided and would therefore "interfer[e] with the goals of encouraging orderly promotion and a youthful military." *Id.* at 234-35. The Court, however, noted in closing that Congress was free to change the law if it decided that former spouses should be afforded greater protections. *Id.* at 235-36.

Congress responded by passing the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, tit. X, 96 Stat. 730 (1982) (codified, in relevant part, at 10 U.S.C. § 1408). The USFSPA overrode *McCarty* in part: it authorized state courts to treat MRP as divisible property, but it excluded from this authority, *inter alia*, the power to divide any portion of MRP that a veteran waives to obtain disability pay. Specifically, as relevant here, the Act provided that "a court may treat *disposable retired or retainer pay* payable to a member ... either as property solely of the member or as property of the member and his spouse," 96 Stat. at 731 (emphasis added), and it defined "disposable retired or retainer pay" as a veteran's "total monthly retired or retainer pay," minus "amounts waived in order to receive compensation under ... title 38 [*i.e.*, disability pay]," 96 Stat. at 730-31.

In *Mansell v. Mansell*, this Court held that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. There, a military retiree had waived a portion of his MRP in favor of disability pay under title 38. When he and his wife divorced in California, they entered into a property settlement that obligated the retiree to pay his wife "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability benefits." *Id.* at 586. The retiree later petitioned the state courts to modify the divorce decree to remove this provision, but they refused to do so. *Id.*

This Court reversed. It explained that "pre-existing federal law, as construed by [*McCarty*], completely pre-empted the application of state community property law to military retirement pay" and that "Congress could overcome the *McCarty* decision only be enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." *Id.* at 588. It then held that although the USFSPA "affirmatively grants state courts the power to divide military retirement pay," that grant "is both precise and limited." *Id.* "[U]nder the Act's plain and precise language, state courts have been granted the authority to treat *disposable* retired pay as community property; they have not been granted the authority to treat total retired pay as community property." *Id.* at 589 (emphasis added). And, because "disposable retired pay" excludes MRP that a retiree has waived to receive disability pay, the USFSPA did not disturb the prior federal rule of non-divisibility with respect to any portion of MRP that a military retiree waives in favor of disability pay. *Id.*

Only a year after *Mansell*, Congress revisited the USFSPA's definition of "disposable retired pay." It revised the definition to include amounts withheld for federal, state, and local tax purposes and certain debts of the retiree. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1484, 1569–70 (1990). But Congress elected to retain, in slightly reworded form, the exclusion of waived MRP. As amended, the definition of "disposable retired pay" requires state courts to take "total monthly retired

pay" and deduct "amounts which ... are deducted from ... retired pay ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38 [*i.e.*, disability pay]." 10 U.S.C. § 1408(a)(4)(B). The exclusion of waived MRP from the definition of divisible property remains intact today.

When it amended the USFSPA in 1990, Congress' decision to retain this exclusion was not an oversight. The House Report accompanying the legislation stated: "The USFSPA authorizes state courts to treat 'disposable retired or retainer pay' as property and defines such pay to exclude military retired pay waived in order for the retiree to receive veterans' disability and civil service benefits," as well as "amounts owed by the member to the United States, fines and forfeitures from courts-martial, federal employment taxes, and amounts withheld for income tax purposes." H.R. Rep. No. 101-665, at 279 (1990). It then noted that "the exclusion of tax withholdings and individual debts of the service member from the computation of disposable retired pay ha[d] created unfairness" and that the amendments would modify the definition of "disposable retired pay" to alleviate those concerns. *Id.* at 280. But the Report expressly noted: "Current law provisions that permit the deduction from gross retired pay of amounts waived in order to receive veterans' disability compensation ... would not be changed." *Id.*

B. Proceedings Below

In 1991, Petitioner John Howell and Respondent Sandra Howell divorced in Arizona. Like California, Arizona generally treats "[a]ll property acquired by either husband or wife during the marriage" as "the

community property of the husband and wife." Ariz. Rev. Stat. § 25-211. Relevant here, Arizona treats MRP as "a form of deferred compensation" which "belong[s] to the community." Pet. App. 12a. Consistent with that principle, the parties agreed to a divorce decree which provided that "[Respondent] is entitled to and is awarded as her sole and separate property FIFTY PERCENT (50%) of [Petitioner]'s military retirement when it begins through a direct pay order." *Id.* at 2a, 41a.[4] Petitioner retired from the Air Force in 1992 after a twenty-year career, and the parties began receiving MRP shortly thereafter. *Id.* at 2a-3a.

In 2005, the Department of Veterans Affairs (VA) determined that Petitioner suffers from degenerative joint disease in his shoulder and that this impairment qualifies as a service-connected disability. The VA estimated that Petitioner's disability reduces his earning capacity by twenty percent. *Id.* at 3a; *see* 38 U.S.C. § 1155 (explaining disability-rating system). Accordingly, he qualifies for monthly payments of tax-exempt disability pay to replace his lost earnings. Pet. App. 3a. In order to obtain this compensation, Petitioner was required to waive an equal portion of his MRP. *See* 38 U.S.C. § 5304(a)(1). He therefore executed such a waiver, effective from July 2004. Pet. App. 3a. As a consequence, the MRP payments to both Petitioner and Respondent declined.

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[4] A "direct pay order" authorizes the federal government to make payments directly to a former spouse who has been awarded a portion of a veteran's MRP. *See* 10 U.S.C. § 1408(d); *Mansell*, 490 U.S. at 585.

In 2013, Respondent brought an action to "enforce" the provision of the divorce decree regarding MRP, arguing that it entitled her to half of the full value of the MRP for which Petitioner is eligible, notwithstanding any waiver on his part. *Id.* at 3a-4a. The Arizona Superior Court agreed and ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability." *Id.* at 28a. The Arizona Court of Appeals affirmed. *Id.* at 21a.

The Arizona Supreme Court affirmed, rejecting Petitioner's contention that the divorce court's order was preempted by the USFSPA. *Id.* at 5a. The court acknowledged that *Mansell* barred state courts from "dividing MRP that has been waived to receive disability benefits." *Id.* at 6a (citing *Mansell*, 490 U.S. at 589). But the court stated that this case presents the distinct question of "how the family court should proceed when a veteran elects a VA waiver to receive disability benefits *after* entry of a dissolution decree, thereby reducing the ex-spouse's share of previously awarded MRP." *Id.* The court concluded that although "the family court cannot divide MRP that has been waived to obtain disability benefits either at the time of the decree or thereafter," the court was free to order Petitioner to *indemnify* Respondent for the reduction in her share of MRP. *Id.* at 7a. It stated:

> The 2014 Order did not divide the MRP subject to the VA waiver, order [Petitioner] to rescind the waiver, or direct him to pay any amount to [Respondent] from his disability pay. Under these circumstances, the family court did not

> violate the USFSPA or *Mansell* because it did not treat the MRP subject to the VA waiver as divisible property. ... Nothing in the USFSPA directly prohibits a state court from ordering a veteran who makes a post-decree VA waiver to reimburse the ex-spouse for reducing his or her share of MRP.

Id. at 7a-8a.

The court also rejected Petitioner's alternative argument under state law that the indemnification order violated Arizona Revised Statute § 25-318.01, a 2010 statute that provides that a state court "shall not" "[i]ndemnify the veteran's spouse or former spouse for any prejudgment or postjudgment waiver or reduction in military retired or retainer pay related to receipt of ... disability benefits." Pet. App. 8a-9a; *see* Ariz. Rev. Stat. § 25-318.01. The court noted that although the Arizona statute does not apply in enforcement proceedings, it does apply in actions to modify decrees, and this was such an action because the divorce court's order modified the original divorce decree. Pet. App. at 10a (explaining that "[b]ecause the decree did not require [Petitioner] to indemnify [Respondent] for her loss of MRP, the 2014 Order necessarily modified the original property disposition terms"). The court nonetheless found that the state constitution's due process guarantee precluded application of the statute in the present case. It stated that once the dissolution decree dividing MRP was finalized in 1991, Respondent had a vested property interest in one-half of Petitioner's MRP, and a subsequently enacted state statute could not deprive Respondent of a remedy for a

deprivation of that interest. *Id.* at 12a-14a.

SUMMARY OF ARGUMENT

A state law is preempted when it directly contradicts a federal statute, or when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013). The divorce court's order is preempted under either of these two legal standards.

First, the divorce court's order directly contradicts the USFSPA. The USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veteran's disability benefits." *Mansell*, 490 U.S. at 594-95. In this case, the divorce court ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." Pet. App. 28a. That order constituted a division of Petitioner's waived military retirement pay. It directed Petitioner to pay Respondent an amount equal to half of his waived military retirement pay, which is the very definition of treating waived military retirement pay as divisible property.

Alternatively, the divorce court's order frustrates the purposes and objectives of Congress. Congress' purpose and objective was to ensure that divorced, disabled veterans keep all of their disability pay, even if they waive a portion of their military retirement pay in order to receive that disability pay. Yet, as a result of the divorce court's order, Petitioner must pay an

amount equal to half of his disability pay to Respondent every month. As several of this Court's family law cases have made clear, such an order is preempted because it frustrates Congress' purpose to ensure that the veteran's disability pay reach the veteran alone.

The arguments of the Arizona Supreme Court and Respondent in defense of the divorce court's order are unpersuasive. The Arizona Supreme Court attempted to distinguish *Mansell* on the ground that Petitioner's waiver occurred after the divorce, rather than before the divorce as in *Mansell*. But the USFSPA does not distinguish between pre-divorce waivers and post-divorce waivers. Nor does the USFSPA suggest that modified divorce decrees need not comply with federal law.

In addition to being irreconcilable with the statutory text, the Arizona Supreme Court's distinction between pre-divorce and post-divorce waivers makes little sense. The court's decision would strip the USFSPA's protections from any active-duty service member who gets a divorce, and would lead to arbitrary distinctions depending on the timing of the VA's decision to award disability pay.

The Arizona Supreme Court also cited the presumption against preemption as a justification for the divorce court's order. But that presumption cannot save the order. The order so clearly violates federal law that any presumption against preemption would be overcome. And, in any event, the presumption against preemption should not apply in this case. Such a presumption would be inconsistent with *Mansell*, which recognized that state law was completely preempted in

this area and that state courts could only act if Congress affirmatively *granted* them the power to do so. Such a presumption would also be inconsistent with the strong federal interest in regulating the disposition of military benefits, as well as the long history of federal legislation in this area. Finally, presuming that Congress did not intend to preempt state divorce law would be unwarranted given that the USFSPA is a statute that specifically deals with divorce.

The Arizona Supreme Court's conclusion—as part of its state-law analysis—that Respondent had a "vested right" to half of Petitioner's waived military retirement pay cannot defeat federal preemption. The whole point of *Mansell* is that federal law *prohibits* the creation of such a vested right.

Finally, at the certiorari stage, Respondent relied on the *Mansell* dissent for the proposition that the USFSPA's "saving clause" authorizes the divorce court's order. The majority opinion in *Mansell*, however, rejected Respondent's interpretation of the savings clause, and its reasoning is equally applicable here.

There is no meaningful distinction between this case and *Mansell*. The judgment of the Arizona Supreme Court should therefore be reversed.

ARGUMENT

I. THE USFSPA PREEMPTS THE DIVORCE COURT'S ORDER.

"State law is preempted to the extent of any conflict with a federal statute." *Hillman*, 133 S. Ct. at 1949-50

(quotation marks omitted). Accordingly, a state law is preempted when it directly contradicts a federal statute. *See id.* at 1950 (noting that "a conflict occurs when compliance with both federal and state regulations is impossible"). Alternatively, a state law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quotation marks omitted).

In this case, the divorce court's order is preempted under either of these two legal standards. First, the divorce court's order is preempted because it divides Petitioner's waived MRP and thus directly violates 10 U.S.C. § 1408(a)(4)(B) and (c)(1). Accordingly, the Court need not even consider the application of its broader "purposes and objectives" preemption doctrine.

If the Court applies its "purposes and objectives" preemption doctrine, then this case becomes even easier. All parties agree that federal law prohibits the division of Petitioner's disability pay and would, therefore, preempt a state court order purporting to divide Petitioner's disability pay. But the divorce court's order is the exact economic equivalent of a division of Petitioner's disability pay and, if permitted to stand, would defeat Congress' purpose of ensuring that disability pay reaches the veteran alone. As this Court has held in several cases, a state family court cannot do indirectly what federal law bars it from doing directly: where a federal law bars a state family court from dividing an asset, a state family court cannot evade that federal law by issuing an order that is the economic equivalent of dividing the asset. Those cases

establish that the divorce court's order here is preempted.

A. The Divorce Court's Order Directly Violates Federal Law.

The USFSPA authorizes a divorce court to treat "disposable retired pay" as community property.[5] 10 U.S.C. § 1408(c)(1). As pertinent here, "disposable retired pay" is defined as "total monthly retired pay" minus "amounts which ... are deducted from the retired pay of such member ... as a result of a waiver of retired pay required by law in order to receive compensation under ... title 38." *Id.* § 1408(a)(4). It therefore excludes amounts waived to receive disability pay. *See* 38 U.S.C. §§ 1110, 1131 (providing compensation to veterans with service-connected disabilities); 38 U.S.C. § 5305 (requiring waiver of MRP to receive disability pay). As explained above, this Court held in *Mansell* that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to

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[5] The USFSPA applies in both "community property" states, like Arizona and California, and "equitable distribution" states, which divide property according to equitable principles rather than automatically treating all property acquired during marriage as property of the community. Because Arizona is a community property state, Petitioner refers to the issue in terms of community property for the remainder of this brief, as the Court did in *Mansell*. 490 U.S. at 584 n.2 ("The language of the Act covers both community property and equitable distribution States, as does our decision today. Because this case concerns a community property State, for the sake of simplicity we refer to § 1408(c)(1) as authorizing state courts to treat 'disposable retired or retainer pay' as community property.").

receive veteran's disability benefits." 490 U.S. at 594-95; *supra*, at 6-7.

In this case, however, the divorce court divided Petitioner's waived MRP when it ordered Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." Pet. App. 28a. It thus violated federal law.

To understand why, consider the following: In 2004, Petitioner waived $255 per month in MRP in order to start receiving an equivalent amount in disability pay from the VA. As a result, Respondent's monthly payment from the federal government representing her 50% interest in Petitioner's MRP decreased by $127.50—*i.e.*, half of $255. *Id.* at 3a. Respondent returned to the divorce court, seeking reimbursement for the $127.50 per month that she was no longer receiving from the federal government because of Petitioner's waiver. The amount of money Respondent was no longer receiving from the federal government was, by definition, one-half of the amount of MRP that Petitioner had waived to receive disability pay.

The divorce court subsequently directed Petitioner to "ensur[e] [Respondent] receive[s] her full 50% of the military retirement without regard for the disability [waiver]." *Id.* at 28a. Thus, the divorce court ordered Petitioner to pay one-half of his disposable MRP to Respondent, as well as an amount equal to one-half of his waived MRP—*i.e.*, $127.50 per month. By requiring Petitioner to pay a one-half share of his waived MRP to Respondent each month, the divorce court divided Petitioner's waived MRP.

The Arizona Supreme Court insisted that the divorce court "did not divide the MRP subject to the VA waiver" because it merely required Petitioner to "reimburse" Respondent for the MRP waiver. *Id.* at 7a. But an order dividing MRP subject to a VA waiver, and an order requiring a veteran to reimburse a spouse for half of the amount of waived MRP, are the exact same thing. When a divorce court divides MRP subject to a VA waiver, the only possible way for a divorce court to enforce such a division of property is to direct the veteran to pay the ex-spouse, out of pocket, an amount equivalent to half of the waived MRP. After all, a veteran does not receive the waived amount from the federal government and must therefore satisfy such an order out of the veteran's general assets. Thus, there is no difference whatsoever between an order dividing waived MRP and an order requiring a veteran to reimburse an ex-spouse for waived MRP.

In sum, an order directing Petitioner to ensure Respondent receives her "full 50% of the military retirement without regard for the disability [waiver]," *Id.* at 28a, is an order that divides waived MRP, in violation of the USFSPA. The Court's analysis should end there.

B. The Divorce Court's Order Conflicts with Congress' Purposes and Objectives.

Alternatively, the divorce court's order conflicts with the purposes and objectives of the USFSPA.

First, although the "legislative history does not indicate the reason for Congress' decision to shelter

from community property law that portion of military retirement pay waived to receive veterans' disability payments," *Mansell*, 490 U.S. at 592, it is beyond dispute that Congress' "purpose" and "objective" was to prevent state courts from dividing waived MRP. Thus, even if the Court concludes that there is some technical distinction between an order "dividing waived MRP" and a "reimbursement" or "indemnification" order, it should, at a minimum, hold that a reimbursement order conflicts with Congress' *purpose* of preventing state courts from dividing waived MRP. Permitting state courts to evade federal law by labeling their orders "reimbursement" or "indemnification" orders for waived MRP rather than "division" orders of waived MRP—when those two types of orders accomplish the same result—would defeat the USFSPA's purpose.

Moreover, the statute has a second, closely related "purpose" and "objective." The statute bars divorce courts from treating as community property any MRP that is waived "in order to receive compensation under ... title 38"—*i.e.*, disability pay. The point of this provision is to ensure that, in the context of divorce, disabled veterans keep all of their disability pay. *See McCarty*, 453 U.S. at 228 (purpose of federal preemption of state community property law is to ensure that federal benefit "actually reach the beneficiary") (quotation marks omitted). There is common ground on this point—the Arizona Supreme Court, Respondent, and the Government all agree that disability pay is not divisible, at the time of divorce or anytime thereafter, and that an order directly dividing

Petitioner's disability pay would be preempted. Pet. App. 7a; Br. in Opp. 15, 18-19; Gov't CVSG Br. 9-10.

But again, the divorce court's order plainly contravenes this purpose. Under the order, every month Petitioner must pay Respondent an amount equal to one-half of his disability pay. That is the precise economic equivalent of dividing Petitioner's disability pay, and it poses an obvious conflict with the congressional purpose that, in the context of divorce, a veteran is entitled to keep all of his disability pay.

This Court's precedents confirm that such an order conflicts with federal law. In a series of family law cases dating back over 60 years, this Court has held that if federal law confers a benefit on one person, state courts cannot nullify that federal law by requiring the person to pay an equivalent amount to someone else.

In *Wissner v. Wissner*, 338 U.S. 655 (1950), the federal National Service Life Insurance Act gave an Army officer the right to designate the beneficiary of his life insurance policy. The Army officer designated his mother. *Id.* at 656-57. After he died, his widow brought suit against his parents, alleging that she was entitled to half the proceeds of the policy under California's community property laws. *Id.* at 657-58. The California state court found in the widow's favor, but this Court reversed, finding that the federal statute preempted California community property law. The Court held that because "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other," a state court could not redirect the proceeds pursuant to its community property laws. *Id.* at 658. Critically, the

Court deemed it irrelevant whether the widow sought the insurance proceeds themselves or a judgment for an amount equivalent to the proceeds: "Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.* at 659; *see also Ridgway v. Ridgway*, 454 U.S. 46 (1981) (adhering to *Wissner* and holding that federal law granting service member right to select life insurance beneficiary preempted state law, which imposed constructive trust on life insurance benefits in favor of service member's ex-wife pursuant to terms of divorce decree).

Similarly, in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the federal Railroad Retirement Act conferred on retired railroad workers an entitlement to retirement and disability benefits. *Id.* at 573-77. A California divorce court, applying state community property law, awarded a railroad worker's ex-wife a share of the worker's expected benefits. *Id.* at 577-81. As in *Wissner*, this Court reversed, holding that federal law preempted California state community property law. The Court rejected the ex-wife's argument that a divorce court could order the retired worker "to pay her an appropriate portion of his benefit, *or its monetary equivalent*," holding that such an order "would mechanically deprive petitioner of a portion of the benefit Congress ... indicated was designed for him alone." *Id.* at 583 (emphasis added). It reasoned that "Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the

employee to retire. Any automatic diminution of that amount frustrates the congressional objective." *Id.* at 585. Again, the Court's reasoning applied irrespective of whether the divorce court ordered the railroad worker to pay his ex-wife his federal benefits or the monetary equivalent of those benefits.

Most recently, in *Hillman*, this Court addressed the preemptive effect of the Federal Employees' Group Life Insurance Act of 1954, which permits federal employees to designate the proceeds of their federal life insurance policies. The federal employee in the case designated his first wife, Maretta, as his beneficiary; he later divorced and remarried his second wife, Hillman, but never changed his designation of beneficiary. 133 S. Ct. at 1949. After his death, Maretta received the insurance proceeds in accordance with the federal statute. *Id.* Hillman then sued Maretta under a Virginia law that would have made Maretta personally liable to Hillman for the exact amount Maretta received in insurance proceeds from the government. *Id.* This Court held that the Virginia statute was preempted, concluding: "[A]pplicable state law substitutes the widow for the beneficiary Congress directed shall receive the insurance money, and thereby frustrates the deliberate purpose of Congress to ensure that a federal employee's named beneficiary receives the proceeds." *Id.* at 1952 (citation and quotation marks omitted). The Court additionally explained: "It makes no difference whether state law requires the transfer of the proceeds, ... or creates a cause of action[] ... that enables another person to receive the proceeds upon filing an action in state court. In either case, state law

displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead." *Id.*

Wissner, *Hisquierdo*, and *Hillman* resolve this case. All parties agree that the Arizona divorce court was barred from directly dividing Petitioner's disability pay. Under *Wissner*, *Hisquierdo*, and *Hillman*, an order requiring Petitioner to pay Respondent an amount equal to one-half of his disability pay each month must be preempted as well because it is the economic equivalent of an order dividing Petitioner's disability pay, and would frustrate Congress' purpose of ensuring that Petitioner keep all of his disability pay.

Notably, the divorce court's order is preempted under the approach of every member of the *Hillman* Court. All members of the *Hillman* Court agreed that the Virginia statute was preempted, but two Justices, Justice Thomas and Justice Alito, concurred separately in the judgment. Even under the reasoning adopted by those Justices, however, the result in this case would be the same.

Justice Alito agreed with the application of the purposes-and-objectives preemption test but characterized the pertinent "purpose" and "objective" as "the effectuation of the insured's expressed intent" regarding the beneficiary of life insurance proceeds. *Id.* at 1957 (emphasis omitted). In Justice Alito's view, the Virginia statute frustrated that purpose by "overrid[ing] the insured's express declaration of his or her intent." *Id.* Here, the divorce court's order overrides Congress' express purpose of ensuring that disabled veterans receive the full amount of disability

pay to which they are entitled.

Justice Thomas disagreed with the application of a "'purpose and objectives' framework" and would instead have asked whether the "duly enacted federal law effectively repeal[ed] contrary state law." *Id.* at 1955 (Thomas, J., concurring in judgment) (quotation marks and alterations omitted). In Justice Thomas's view, the Virginia law was preempted under that standard because although it did not "preclude the direct payment of benefits to the designated beneficiary," "it accomplishe[d] the same prohibited result by transforming the designated party into little more than a passthrough for the true beneficiary." *Id.* at 1956. The same is true here. Even if there is some technical distinction between an order dividing MRP and the divorce court's "reimbursement" order, the divorce court, at the very least, "accomplishe[d] the same prohibited result," *id.*, by directing Petitioner to pay Respondent an amount equivalent to half of his waived MRP. And although the decree did not directly interfere with Petitioner's receipt of his disability pay, it achieved the same prohibited end by establishing Petitioner as nothing more than a passthrough for a one-half share of his disability pay. Thus, the divorce court's order "cannot be squared," *id.*, with the USFSPA, and it is preempted.

II. THE ARGUMENTS IN FAVOR OF UPHOLDING THE DIVORCE COURT'S ORDER ARE INCORRECT.

At the certiorari stage, Respondent and the Government advanced four arguments in support of the divorce court's order.

First, they argued that this case differs from *Mansell* because Petitioner became disabled after the divorce, rather than before the divorce, as in *Mansell*.

Second, they argued that the presumption against preemption requires a holding of non-preemption here.

Third, they argued that the divorce court's order was proper because it vindicated Respondent's state-law "vested right."

Fourth, Respondent (though not the Government) argued that the divorce court's order fell within the USFSPA's "saving clause."

As explained below, none of these arguments can override the USFSPA's text and purpose, which squarely prohibit the divorce court's order.

A. The USFSPA does not distinguish between disabilities that arise before and after a divorce.

1. *The USFSPA's text and purpose give no basis for distinguishing between pre-divorce and post-divorce waivers.*

The Arizona Supreme Court, Respondent, and the Government all argue that this case is distinguishable from *Mansell* because here Petitioner waived his MRP after the divorce and the divorce court awarded Respondent money representing half of Petitioner's waived MRP in a *modified* decree, whereas in *Mansell* the veteran waived his MRP before the divorce and the award of waived MRP was in the *original* decree. Pet. App. 6a-7a; Br. in Opp. 15-16; Gov't CVSG Br. 8.

This argument has no statutory basis whatsoever. Nothing in the statutory text even hints that pre-divorce and post-divorce waivers of MRP should be treated differently. The statute prohibits a divorce court from treating waived MRP as community property regardless of when the waiver occurs.

Likewise, there is no statutory basis for the proposition that modified decrees are somehow exempt from the USFSPA. The USFSPA contemplates that decrees may be modified: it defines a "court order" to include "a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree." 10 U.S.C. § 1408(a)(2). The statutory prohibition on dividing waived MRP does not distinguish between modified decrees and original decrees. There is, therefore, no basis for concluding that a divorce court may include a term in a modified decree that would have been illegal in an original decree.

Nor does a distinction between pre-divorce and post-divorce waivers of MRP advance the USFSPA's purpose. As discussed above, the statute's purpose is to ensure that veterans keep all of their disability pay. That purpose is not advanced by distinguishing between a veteran who waives MRP after a divorce and a veteran who waives MRP before a divorce.

Moreover, although the legislative history does not specify the reason that Congress excluded waived MRP from the definition of divisible property, the policy rationales for that exclusion are straightforward.

Barring the division of waived MRP—and hence allowing disabled veterans to keep all of their disability pay—is consistent with the special solicitude the Nation has long shown for veterans who become disabled by virtue of their military service. Additionally, disabled veterans have reduced earning capacity—a veteran's disability rating is determined by reference to "the average impairments of earning capacity resulting from such injuries in civil occupations." 38 U.S.C. § 1155. Thus, barring the division of waived MRP may allow financially vulnerable disabled veterans, who may be unable to earn extra income in order to make up for payments to their ex-spouses, to remain afloat. These policy rationales apply with identical force regardless of whether a veteran waives MRP before or after a divorce.

The Arizona Supreme Court's distinction between pre-divorce and post-divorce MRP waivers simply has no basis in the USFSPA.

2. ***There is no practical distinction between the division of MRP in a modification order and the division of MRP in an original decree.***

The Arizona Supreme Court appeared to believe that there is some kind of fundamental distinction between dividing waived MRP in an original decree and requiring reimbursement for waived MRP in a modified decree. But that is incorrect, as a simple example will show. Suppose that a veteran and his spouse file for divorce. At the time of the divorce, the

veteran has not waived MRP and is not receiving disability pay, but the divorce court recognizes that the veteran might do so at some point in the future. The divorce court concludes that such a future waiver would be unfair. It therefore issues a decree stating: "if the veteran ever waives MRP in order to receive disability pay, the veteran will continue to ensure that his ex-spouse receives 50% of his total MRP." Such a decree would clearly be preempted: it would run afoul of *Mansell*'s rule that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95.

Now, to slightly modify the example, suppose the divorcing parties present the court with a proposed settlement decree in which—in line with *Mansell*—only disposable MRP, but not waived MRP, is divided. The divorce court, however, concludes that such a decree is unfair to the ex-spouse. Over the veteran's objection, the divorce court modifies the proposed decree to direct the veteran to continue to ensure that his ex-spouse receive half of his total MRP, including waived MRP, should he ever execute such a waiver in order to receive disability pay. Again, such an order would be preempted under the plain terms of *Mansell*'s holding because the court would be inserting a term into the decree that effectively divides waived MRP.

The present case is, however, virtually identical to the latter example. As in that example, the divorce court's order in this case modified the decree that the parties had agreed upon. Pet. App. 2a, 10a. The

economic effects of the orders in the latter example and in this case are the same: in both cases, when a veteran waives MRP after a divorce, the ex-spouse continues to receive half of the veteran's total MRP. The only difference between the latter example and this case is that in this case, the divorce court reopened the proceedings and altered the decree at the time of the waiver, rather than altering it at the time of the divorce. Yet nothing in the statute suggests that the timing of the divorce court's alteration of the decree should make a difference to federal preemption. Nor do any of the federal interests at stake depend on the timing of the state court's order. There is no rational reason Congress would have wanted to preempt the first type of order but not the second.

Indeed, the effect of the Arizona Supreme Court's holding is to insert an implied term in every Arizona divorce decree[6] involving an active-duty service member or nondisabled veteran that entitles a former spouse to a reimbursement order in the amount of half of the veteran's waived MRP should the veteran ever waive MRP in order to receive disability pay. Such a ruling is substantively identical to a ruling requiring every decree involving an active-duty service member or nondisabled veteran to include a provision explicitly dividing future waived MRP. *Mansell* directly forbids such a ruling.

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[6] More precisely, in every pre-2010 divorce decree, because such an indemnification order in a post-2010 divorce decree would violate a state statute. Ariz. Rev. Stat. § 25-318.01. In other states lacking such statutes, however, similar reasoning would introduce an implied term into every decree.

3. *The Arizona Supreme Court's interpretation would strip all active-duty service members of the USFSPA's protection.*

There is another reason that the Arizona Supreme Court's distinction between pre-divorce and post-divorce MRP waivers cannot be right. It would introduce an enormous loophole into the USFSPA: the statutory bar on dividing waived MRP would be rendered completely irrelevant for *any* service member who, like Petitioner, gets divorced while on active duty. Active-duty service members, by definition, do not receive MRP and thus cannot waive MRP in order to receive disability pay. Accordingly, under the Arizona Supreme Court's interpretation of the USFSPA, when *any* active-duty service member gets divorced, a divorce court can divide his future MRP; and if the service member later waives a portion of that MRP, the divorce court can later modify the decree and force the service member to pay half of the waived MRP to his ex-spouse pursuant to a "reimbursement" order. In effect, therefore, a divorce court can award the ex-spouse an interest in the service member's total MRP, including any portion that the service member may waive to receive disability pay.

Yet *McCarty*—the very case that prompted the enactment of the USFSPA—was all about divorces by active-duty service members. Mr. McCarty himself was an active-duty service member at the time of the divorce; like the divorce court in this case, the divorce court in *McCarty* awarded Mrs. McCarty an interest in the MRP he would receive upon his future retirement

from the military. 453 U.S. at 217-18. The Court's preemption analysis also focused almost exclusively on the effect of state community property law on active-duty service members. The Court identified two reasons that state community property law was preempted: (1) active members of the military "are not free to choose their place of residence," and (2) active members of the military should not have a "lessen[ed] incentive to retire." *Id.* at 234-35.

When Congress later enacted the USFSPA, it prohibited divorce courts from dividing waived MRP. If Congress had intended for that prohibition to be rendered meaningless for all active-duty service members who get divorced, one would think that the statute would have contained some textual indication of this intent. However, no such indication appears. The Court should not interpret the statute in a way that produces this anomalous result.

4. ***Distinguishing between pre-divorce and post-divorce waivers would lead to irrational results.***

It is so plain that the USFSPA treats pre-divorce and post-divorce waivers alike that the Court need not consider whether distinguishing between these two types of waivers makes policy sense. Should the Court deem this issue pertinent, however, the bizarre consequences of adopting this distinction further counsel against upholding the Arizona Supreme Court's interpretation. To name a few:

1. Under the Arizona Supreme Court's rule, an ex-spouse's entitlement to reimbursement for reductions

in the divorced couple's community property turns on the timing of the veteran's disability determination. If the veteran waives MRP and begins receiving disability pay before the divorce, the ex-spouse cannot receive any portion of the waived MRP. If the veteran waives MRP and begins receiving disability pay after the divorce, however, the ex-spouse can modify the decree so as to obtain a monthly payment equal to one-half of the disability pay.

Such a system would make the economic position of the parties turn on the amount of time it takes for the VA to process an application for disability pay. If the VA processes the application quickly, and the waiver occurs before the divorce, the veteran keeps his disability pay and the former spouse's share of MRP is reduced; if the VA processes the application slowly, and the waiver occurs after the divorce, the veteran may be forced to effectively share VA disability pay with a former spouse. The processing time of an application is highly variable given the famously dysfunctional nature of the VA benefits process. *See, e.g.*, Ian Duncan, *Amid Stubborn Backlog, VA Plans to Outsource More Disability Exams*, Baltimore Sun, Oct. 4, 2016, http://www.baltimoresun.com/news/maryland/politics/bs-md-va-exams-contract-20161003-story.html. It may depend on whether a veteran is able to obtain benefits in his initial application, or whether he is only able to obtain benefits after enduring the years-long appeals process. *See, e.g.*, Alan Zarembo, *VA Is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. Times, Nov. 23, 2015, http://www.latimes.com/nation/la-na-veterans-appeals-

backlog-20151123-story.html. It is unlikely Congress intended for the economic position of veterans to turn on such random factors.

2. The Arizona Supreme Court's rule would inexplicably favor spouses from shorter marriages over spouses from longer marriages. Under the Arizona Supreme Court's rule, the spouses of veterans who waive MRP after a divorce can claw back half of the waived MRP through an indemnification order, whereas the spouses of veterans who waive MRP before a divorce cannot. Yet pre-divorce waivers of MRP typically occur in longer marriages—a pre-divorce waiver can only arise when a veteran serves a full military career, becomes eligible for MRP, and then waives a portion of his MRP. By contrast, post-divorce waivers will typically occur in the context of shorter marriages; for instance, divorces involving active-duty service members will invariably involve post-divorce rather than pre-divorce waivers.

Yet Congress frequently *favors* spouses from longer marriages. The extent of a military spouse's protection is generally a function of the length of the marriage. Under the USFSPA, divorced military spouses who were married for at least 10 years during which the veteran performed at least 10 years of military service become eligible for direct payments of MRP from the federal government (as opposed to payments from the veteran pursuant to a decree). 10 U.S.C. § 1408(d)(2). Under a related provision, divorced military spouses who were married for at least 20 years during which the veteran performed at least 20 years of military service become eligible for military health care under

the TRICARE program, as well as commissary and other privileges. 10 U.S.C. § 1072(2)(F). In light of Congress' solicitude for spouses from longer marriages, it would be incongruous to impute an intent to Congress to treat spouses from longer marriages worse than spouses from shorter marriages, especially without any textual indication of this intent.

3. Equally inexplicably, the Arizona Supreme Court's rule would favor spouses who never rely on disability benefits during a marriage over those who do. Under *Mansell*, a spouse who relies on the disability pay that substitutes for waived MRP during the marriage—say, by quitting her job in order to care for her disabled spouse—has no community property entitlement to half of that waived MRP. Yet, under the Arizona Supreme Court's interpretation of the USFSPA, a spouse who never was supported by disability pay during the marriage may obtain the economic equivalent of a one-half interest in the spouse's waived MRP by virtue of a post-divorce modification order. It is implausible that Congress would have wanted to confer such a remedy on spouses who never cared for disabled veterans, while simultaneously denying it to spouses who did.

4. The Arizona Supreme Court's decision would give an incentive to military spouses to file for divorce quickly. Suppose a veteran experiences pain and believes he might have a service-related disability (or might already have applied for disability pay). His marriage comes under strain, perhaps in part because of the disability itself. His spouse consults a divorce lawyer. Under the Arizona Supreme Court's decision,

any competent divorce lawyer would advise the spouse to file for divorce as soon as she can. If she files immediately, she can guarantee herself an amount equivalent to the veteran's total MRP for the rest of her life—she can obtain an award of MRP now, and enforce her "vested right" to obtain an indemnification award equivalent to half of any later waived MRP. If she waits, and the veteran waives MRP and begins receiving disability pay before the divorce is finalized, she will only be able to receive the veteran's disposable MRP. Congress likely did not intend to enact a regime under which military spouses have an incentive to divorce their disabled veteran spouses as quickly as possible.

* * *

In sum, the fact that Petitioner became disabled after the divorce, and that Respondent obtained her indemnification order through a modification proceeding rather than in the original decree, is of no moment for federal preemption purposes. What matters is that the divorce court's order required Petitioner to pay Respondent an amount equivalent to one-half of his total, including waived, MRP. Because such an order divided Petitioner's waived MRP, it violates federal law, regardless of its timing in the divorce proceeding. And although even the strongest policy arguments for distinguishing between pre-divorce and post-divorce waivers could not overcome the clarity of the USFSPA's text, the arbitrary consequences that such a distinction would yield are further grounds for rejecting it.

B. The Presumption Against Preemption Cannot Justify the Divorce Court's Order.

The Arizona Supreme Court leaned on the presumption against preemption as a basis for approving the divorce court's order. Pet. App. 7a-8a. Respondent and the Government rely on that same presumption. Br. in Opp. 15-18; Gov't CVSG Br. 10.

The Court need not address whether any presumption against preemption exists in this case because the divorce court's order stands in such clear conflict with federal law that any presumption against preemption would be overcome. As the Court noted in *Hillman*, "family law is not entirely insulated from conflict pre-emption principles, and so we have recognized that state laws governing the economic aspects of domestic relations must give way to clearly conflicting federal enactments." 133 S. Ct. at 1950 (quotation marks and ellipsis omitted). Accordingly, every preemption case on which Petitioner relies in this brief—*Mansell*, *McCarty*, *Hillman*, *Wissner*, *Ridgway*, and *Hisquierdo*—is a family law case in which the Court nonetheless found federal preemption. Under settled law concerning federal preemption in family law cases, the divorce court's order clearly conflicts with the USFSPA and is therefore preempted, regardless of any presumption.

If the Court reaches the issue, however, it should hold that the presumption against preemption does not apply at all in this case or, at most, that it applies in a significantly weakened form. This is so for four reasons.

1. In *McCarty*, the Court held that federal law completely preempted state law with respect to the treatment of MRP in divorce. The Court emphasized that Congress enacted the MRP system pursuant to its constitutional "power '[t]o raise and support Armies,' '[t]o provide and maintain a Navy,' and '[t]o make[] Rules for the Government and Regulation of the land and naval Forces.'" 453 U.S. at 232 (citing U.S. Const., art. I, § 8, cls. 12, 13, and 14), and that "the application of community property principles to military retired pay threaten[ed] grave harm to clear and substantial federal interests." *Id.* (quotation marks omitted).

The USFSPA, of course, overrode *McCarty* with regard to disposable MRP. But in *Mansell*, this Court rejected the argument of Mrs. Mansell and the dissent that "the Former Spouses' Protection Act [was] a complete congressional rejection of *McCarty*'s holding that state law is pre-empted." 490 U.S. at 588; *see id.* at 595-96 (O'Connor, J., dissenting). Instead, the Court explained that "pre-existing federal law ... completely pre-empted the application of state community property law to military retirement pay," and "Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property." *Id.* at 588 (majority opinion). Thus, in the particular context of the disposition of MRP upon divorce, *Mansell* rejected any presumption against preemption. Instead, it held that federal law completely preempts all state law unless a federal statute affirmatively confers power on state divorce courts.

Here, given that the USFSPA expressly *prohibits* state courts from dividing waived MRP, the USFSPA certainly does not provide the sort of congressional authorization required by *Mansell* to allow state courts to require military retirees to indemnify former spouses for post-divorce waivers of MRP.

2. The presumption against preemption does not apply in areas of strong federal interest. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (presumption is not triggered in areas where "the interests at stake are uniquely federal in nature"). The question in this case is whether Congress preempted family court orders that impose additional payment obligations on disabled veterans as a direct result of their decision to waive a portion of their MRP in order to receive disability pay. There are plainly strong federal interests in that question.

First, there is a strong federal interest in regulating military benefits and the rights of veterans. *See, e.g.*, *McCarty*, 453 U.S. at 236 ("[I]n no area has the Court accorded Congress greater deference than in the conduct and control of military affairs"); *Wissner*, 338 U.S. at 660-61 ("Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. ... The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end.").

Moreover, military retirement and disability benefits involve federal tax dollars. As this Court noted in *Hisquierdo*, in holding that federal law preempted state community property law with regard

to the disposition of Railroad Retirement Act benefits, "Railroad Retirement Act benefits from their very inception have federal overtones. Compulsory federal taxes finance them and not just the taxes that fall on the employee. ... Here, California must defer to the federal statutory scheme for allocating Railroad Retirement Act benefits insofar as the terms of federal law require." 439 U.S. at 582. The Court analogized the case to *McCune v. Essig*, 199 U.S. 382 (1905), in which this Court held that federal law preempted state community property law with regard to homesteaded land that was owned by the United States. *See* 490 U.S. at 582 (citing *McCune*, 199 U.S. at 390); *see also Ridgway*, 454 U.S. at 57 (noting that the federal interest in the disposition of service-members' life insurance policies was "especially strong because a substantial share of the proceeds of [such policies] may be attributed to general tax revenues").

In view of these substantial federal interests, there is no reason to presume that Congress would have wanted to leave the legal consequences of waiving MRP in favor of disability pay to the vagaries of state law.

3. The presumption against preemption does not apply in areas "where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). There has been a significant federal presence in determining the disposition of military benefits. Congress has provided disability pensions to veterans since the Revolutionary War and has provided retirement pensions since the Civil War. *McCarty*, 453 U.S. at 211-12. "Historically, military

retired pay has been a personal entitlement payable to the retired member himself as long as he lives." *Id.* at 224 (quoting S. Rep. No. 90-1480, at 6 (1968)) (emphasis omitted).

Moreover, Congress has devoted scrupulous attention to family-law issues surrounding military benefits, constantly tinkering with the governing statutes. To take just a few examples:

- In 1984, Congress authorized enforcement of voluntary divorce agreements in which service members agreed to elect their former spouses as the beneficiaries of annuities under the Survivor Benefit Plan. *See* Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 644, 98 Stat. 2492, 2548 (1984). It also expanded the pool of former spouses eligible to receive military medical benefits. *See* § 645, 98 Stat. at 2548-49.

- Two years later, in 1986, Congress authorized state divorce courts to require that service members elect their former spouses as the beneficiaries of SBP annuities. *See* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 641, 100 Stat. 3816, 3885 (1986). At the same time, it lowered the age at which former spouses may become ineligible for SBP payments if they remarry. § 643, 100 Stat. at 3886. It also modified the definition of "disposable retired pay" in two respects. First, it eliminated deductions for

government life insurance premiums. Second, for veterans who retire from military service by reason of disability, it made the non-disability-related portion of their disability retirement pay eligible for division. § 644, 100 Stat. at 3887.[7]

- In 1990, as mentioned previously, Congress revised the USFSPA's definition of "disposable retired pay" to include amounts withheld for federal, state, and local tax purposes and certain debts of the retiree. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1484, 1569–70 (1990).

- In 1992, Congress enacted financial protections for former spouses of military retirees whose rights to receive MRP are terminated because of domestic abuse involving their former spouses or dependent children. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 653, 106 Stat. 2315, 2426-29 (1992).

- Most recently, on December 23, 2016, the President signed legislation prospectively amending § 1408(a)(4) so that divisible MRP

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[7] Under title 10, chapter 61, service members may be retired by reason of a disability and may receive disability retirement pay. As originally enacted, the USFSPA excluded all disability retirement pay from the definition of disposable retirement pay. 96 Stat. 731. The modification allowed the division of the portion of disability retirement pay not based on a retiree's disability.

> is now defined as "the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order," adjusted for cost of living. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 641. This provision "modifi[es] the division of military retired pay in a divorce decree to the amount the member would be entitled based upon the member's pay grade and years of service at the time of the divorce rather than at the time of retirement." S. Rep. No. 114-255, at 168 (2016). It thus protects active-duty service members who divorce part-way through their military careers by ensuring that only the MRP attributable to their years of service during marriage may be divided.

These are but a sampling of the statutory changes Congress has made in this area. Following *Mansell*, Congress has made other substantive amendments to § 1408 in 1993, 1996 (twice), and 2006[8], as well as numerous technical changes to § 1408.[9] The bar on

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[8] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 555, 107 Stat. 1547, 1666-67 (1993); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 362(c), 110 Stat. 2105, 2246-47; National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 636, 110 Stat. 2422, 2579 (1996); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 665, 119 Stat. 3136, 3317–18.

[9] *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1073, 123 Stat. 2190, 2472–73 (2009);

dividing waived MRP, however, has remained intact.

It is clear from this volume of legislation that Congress views family-law issues surrounding military benefits as issues for the federal government to resolve. In view of Congress' presence in this area, a presumption that Congress intended to leave these issues to state courts is inappropriate.

4. The presumption against preemption is inapplicable because the USFSPA is a statute that specifically deals with divorce. The presumption against preemption is based on the assumption that Congress does not intend to regulate state family law. But as the Court observed in *Mansell*, the USFSPA "presents one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." 490 U.S. at 587. Indeed, this Court held in *Mansell* that the very statutory provision at issue in this case preempted a state divorce decree. Moreover, that provision has no purpose *other than* to

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Servicemembers Civil Relief Act, Pub. L. No. 108-189, § 2, 117 Stat. 2835, 2865–66 (2003); Homeland Security Act of 2002, Pub. L. No. 107-296, § 1704(b), 116 Stat. 2135, 2314; National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1048(c), 115 Stat. 1012, 1226 (2001); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1073, 111 Stat. 1629, 1900–01 (1997); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1501(c), 110 Stat. 186, 498–99; National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1061(a), 105 Stat. 1290, 1472 (1991); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §§ 653(a), 1622(e), 103 Stat. 1352, 1461–62, 1604–05 (1989); Defense Technical Corrections Act of 1987, Pub. L. No. 100-26, § 7(h), 101 Stat. 273, 282 (1987)

override state divorce law by limiting state courts' authority to divide MRP. As such, any presumption against preemption of state divorce law has been overcome, and has no further role to play. *Cf. Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016) (holding that although in some cases the Court has "addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law, in particular state laws regulating a subject of traditional state power," that presumption did not apply in the context of ERISA because ERISA "certainly contemplated the pre-emption of substantial areas of traditional state regulation" (quotation marks omitted)).

For this reason, the present case is easier than cases like *Hillman* and *Wissner*, in which the federal statutes merely addressed federal employees' right to select life insurance beneficiaries and did not expressly regulate the disposition of insurance proceeds upon divorce. In those cases, the Court nonetheless held that the federal interest in ensuring that the proceeds were distributed to beneficiaries as Congress directed trumped state law. Here, the USFSPA's protections for service members appear in a statute that specifically regulates property division upon divorce. The argument for any presumption against preemption is, therefore, much weaker, and the case for finding preemption is even stronger.

C. The Arizona Supreme Court's "Vested Rights" Analysis Cannot Overcome Federal Preemption.

In arguing for affirmance, Respondent asserts that

she had a vested interest in the portion of Petitioner's MRP that he waived post-divorce to receive disability pay, and that "[t]he USFSPA cannot divest a vested interest in military retirement pay." Br. in Opp. 16; *see also* Gov't CVSG Br. 8-9. She relies on the following portion of the Arizona Supreme Court's decision:

> [Respondent] had a vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]. MRP is a form of deferred compensation. Thus, the MRP earned during the parties' marriage belonged to the community and was divisible upon dissolution of the marriage. After the dissolution decree became final and the corresponding qualified domestic relations order issued, nothing more needed to occur to entitle [Respondent] to fifty percent of the MRP; it had already been earned.

Pet. App. 12a (citation omitted). The court then stated that Petitioner's waiver of disability pay had infringed Respondent's vested right and that the indemnification order vindicated this right:

> One spouse cannot invoke a condition solely within his or her control to defeat the community interest of the other spouse. By electing the VA waiver, [Petitioner] did precisely that by essentially converting part of [Respondent's] MRP share. The 2014 Order restored [Respondent's] share of community assets by ordering [Petitioner] to 'make up' the reduction and pay arrearages.

Id. at 13a (citation omitted).

The Arizona Supreme Court did not suggest that Respondent's "vested right" was pertinent to the federal preemption analysis; rather, it was relevant only to the court's state-law analysis. But Respondent insists that the Arizona Supreme Court's framing of the divorce court's order as enforcing a "vested right" defeats federal preemption. Br. in Opp. 16; *see also* Gov't CVSG Br. 8-9.

That argument is unpersuasive. The whole point of *Mansell* is that federal law *prohibits* the creation of such a vested interest. The Arizona Supreme Court held that Respondent had a "vested right to receive future distributions of her share of MRP unencumbered by any adjustments initiated by [Petitioner]," because "MRP is a form of deferred compensation" that "belonged to the community and was divisible upon dissolution of the marriage." Pet. App. 12a. But that is nothing more than a holding that Respondent had a vested right to a one-half share of Petitioner's total, as opposed to disposable, MRP. As discussed previously, state courts have no authority to award former spouses, like Respondent, an interest in service members' *total* MRP; they may only award former spouses an interest in service members' *disposable* MRP.

The Arizona Supreme Court viewed Petitioner's waiver of MRP as "defeat[ing] the community interest" of Respondent and "converting part of" Respondent's "MRP share." *Id.* at 13a. Again, however, the premise of this argument is that Respondent had a "community interest" in Petitioner's *total* MRP, and Petitioner's

waiver of MRP converted part of her share in the total MRP. Creating a "community interest" in Petitioner's total MRP is, however, precisely what federal law prohibits.

Indeed, the exact same argument could have been made in *Mansell*. In *Mansell*, the veteran unilaterally waived a portion of his MRP; that waiver, too, could have been characterized as "defeating" his spouse's community interest and "converting" part of his spouse's MRP share. But the Court nonetheless held that the USFSPA preempted a state's effort to nullify the effect of a veteran's MRP waiver. So too here.

The Arizona Supreme Court evidently intended to ensure that Respondent would not be economically harmed by Petitioner's MRP waiver. But Petitioner had an absolute right to waive MRP in order to receive disability pay—as even the Arizona Supreme Court acknowledged. Pet. App. 10a (noting that Petitioner made an "election of a benefit bestowed by Congress"). And when a veteran waives MRP, the ineluctable effect of such a waiver under the USFSPA is that the amount of divisible community property goes down. The Arizona Supreme Court's effort to ensure that Respondent would not be economically affected by a waiver is contrary to federal law, which dictates that a waiver of MRP *does* decrease the amount of community property.

The Arizona Supreme Court's "vested rights" analysis has another troubling consequence: it would result in some veterans who serve long enough to earn MRP being financially worse off than veterans who do not. Consider two divorced veterans: one earns $1500 a

month in MRP that has been divided in a divorce decree,[10] while the other did not serve long enough to become eligible for MRP. Both veterans are deemed 40% disabled after they get divorced, and both begin receiving $800 a month in disability pay.[11] The first veteran must waive $800 in MRP to receive his disability pay, while the second veteran has no MRP to waive. Under the Arizona Supreme Court's "vested rights" analysis, setting aside tax effects, the first veteran is now worse off than the second veteran. The first veteran now receives $700 in MRP and $800 in disability pay per month, but must pay his ex-spouse $750 per month to vindicate the state-law "vested right" to total MRP, leaving him with $750 per month. But because disability pay is not divisible in divorce, the second veteran may keep his $800 per month. It is unlikely that in enacting the USFSPA, Congress intended to authorize state courts to transform eligibility for MRP into a financial burden.

The situation would have been even worse at the time of the USFSPA's enactment. In 2004, Congress amended federal law to permit veterans with disability ratings of 50% or greater to concurrently receive disability pay and MRP. *Supra* at 4 n.3. Before 2004, however, veterans who had disability ratings exceeding

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[10] Petitioner's gross MRP in October 2013 was $1,474. Pet. App. 3a.

[11] A remarried veteran who is 40% disabled and has two parents and a child would earn $806.12 per month in disability pay. http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp.

50% also had to waive MRP to receive disability pay. For many veterans with high disability ratings, monthly disability pay exceeded monthly MRP, meaning that they had to waive all of their MRP in order to receive disability pay.[12] For divorced, disabled veterans in this situation, the Arizona Supreme Court's "vested rights" analysis would have transformed eligibility for MRP into a financial disaster: they would not receive *any* MRP (because it would all be waived), yet their eligibility for MRP would have triggered their ex-spouses' vested rights to half of their waived MRP, thus effectively depriving them of as much as half of their disability pay each month. And the higher the veteran's waived MRP, the greater the financial disaster. Again, it is unlikely that this result accords with Congress' intent. By contrast, Petitioner's interpretation of the USFSPA—under which state courts may not issue orders that are the economic equivalent of dividing waived MRP—would have prevented this scenario from ever arising.

In sum, the Arizona Supreme Court's "vested rights" analysis cannot defeat federal preemption. The Arizona Supreme Court itself deemed that analysis relevant only to the state-law issues, and for good reason. The recognition of a "vested right" to total MRP directly violates the USFSPA and leads to results Congress could not have intended.

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[12] *See, e.g., Black v. Black*, 842 A.2d 1280, 1282 (Me. 2004) (presenting this scenario); *Clauson v. Clauson*, 831 P.2d 1257, 1259 (Alaska 1992) (same).

D. The Divorce Court's Order Does Not Fall Within the USFSPA's "Saving Clause."

Finally, the divorce court's order does not fall within the USFSPA's "saving clause." The saving clause provides:

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under ... [the direct payments mechanism] has been paid.

10 U.S.C. § 1408(e)(6).

At the certiorari stage, citing this provision and quoting from the *Mansell* dissent, Respondent argued that "a state court order can properly be directed at MRP not being paid directly to Respondent." Br. in Opp. 19.

The *Mansell* majority, however, did not adopt that view. The Court rejected Mrs. Mansell's argument that "because the saving clause expressly contemplates 'other payments' in excess of those made under the direct payments mechanism, the Act does not 'attempt

to tell the state courts what they may or may not do with the underlying property.'" 490 U.S. at 590 (citation omitted). It adopted a "different interpretation" instead: "the saving clause serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism." *Id.* Thus, the saving clause ensures that state courts may enforce orders for alimony and child support; it does not authorize state courts to treat waived MRP as divisible property. That reasoning applies with identical force here, and the Court should reject Respondent's invitation to overrule *Mansell*'s interpretation of the saving clause.

* * *

In *Mansell*, the Court stated: "Congress chose the language that requires us to decide as we do, and Congress is free to change it." *Id.* at 594. In the ensuing years, Congress has devoted scrupulous attention to family-law issues surrounding military benefits, repeatedly amending the USFSPA to achieve a fair balance between the interests of veterans and their ex-spouses. But Congress has left the USFSPA's bar on dividing waived MRP intact. Unless Congress revisits that issue, state courts must abide by the USFSPA. Here, the divorce court's order contradicted both the text and purpose of the USFSPA and is thus preempted by federal law.

CONCLUSION

The judgment of the Arizona Supreme Court should be reversed.

Respectfully submitted,

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